



FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: CWA - 203492

PRELIMINARY RECITALS

Pursuant to a petition filed October 20, 2021, under Wis. Admin. Code, §HA 3.03, to review a decision by the TMG regarding supportive home care (SHC) hours under the Include, Respect, I Self-Direct (IRIS) program, a hearing was held on February 1, 2022, by telephone. Hearings set for November 23, 2021 and January 4, 2022 were rescheduled at the petitioner's request. At the petitioner's request the record was held open 17 days for submission of a post-hearing brief and supplemental exhibits.

The issue for determination is whether the agency correctly limited the SHC service allowance for a second caretaker to 47.25 hours per week.

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Atty. [REDACTED]
Davis & Pledl, S.C.
1433 N Water St, Ste #400
Milwaukee, WI 53202

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: [REDACTED]
TMG
1 S. Pinckney St., Ste. 320
Madison, WI 53703

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a 37-year-old resident of Dane County who is eligible for the IRIS program.
2. Petitioner has a number of diagnoses including physical and developmental disability, Lissencephaly, intractable epilepsy, potential for aspiration, and impaired mobility. She requires 24-hour daily nursing care, and hands-on assistance with all activities of daily living. Her nursing care is paid through the Veterans' Administration.
3. Petitioner resides in a private residence that she shares with her brother. A private-duty nurse is on hand all-day, although occasionally family members fill in when the scheduled nurse is unavailable.
4. In June, 2020, petitioner's guardian first raised the issue of adding a second full-time caretaker. It was not acted upon then, and the issue was raised again in February, 2021. Petitioner's doctor wrote a note saying that petitioner requires 2:1 direct support "at least 40 hours per week to ensure her health and safety." See agency Exhibit F. The agency at that point suggested that the family seek services through the Medicaid personal care worker (PCW) program.
5. Eventually it was concluded that the family simply could not find a PCW agency willing to provide cares. The IRIS agency then agreed to fund 47.25 hours per week SHC for a second caregiver, broken down into 20 hours per week community integration, 10 hours per week chore services, and 17.25 hours per week hands-on assistance with activities of daily living. The 17.25 hours was based upon petitioner's care schedule and was granted only for hands-on 2:1 care assistance, with the nurse being the primary caregiver and the SHC worker the secondary worker.
6. Petitioner was notified of the decision by a notice dated August 23, 2021. Petitioner filed this appeal within the 90-day limit for doing so.

DISCUSSION

The IRIS program was developed pursuant to a Medical Assistance waiver obtained by the State of Wisconsin, pursuant to section 6087 of the Deficit Reduction Act of 2005 (DRA), and section 1915(j) of the Social Security Act. It is a self-directed personal care program.

The federal government has promulgated 42 C.F.R. §441.450 - .484 to provide general guidance for this program. Those regulations require that the Department's agent must assess the participant's needs and preferences (including health status) as a condition of IRIS participation. *Id.*, §441.466. The Department's agent must also develop a service plan based on the assessed needs. Further, "all of the State's applicable policies and procedures associated with service plan development must be carried out ..." *Id.* §441.468.

I note that initially the IRIS agency refused to provide any SHC time for personal care assistance because of the program's mandate that a person utilize other funding sources, including Medicaid, before utilizing IRIS funding. Since PCW services are covered by MA, it was reasoned, the IRIS program could not cover such services under the auspices of SHC. However, because petitioner could not find a PCW agency to handle her cares, the IRIS program, with the blessing of the Department, agreed that SHC could be utilized, but only under the policies of PCW care. The IRIS agency then determined that petitioner receives 17.25 hours of hands-on PCW-type care weekly, and it approved that amount. I note that the other 30 hours SHC, for community integration and chores, are determined separately and are not disputed.

The issue here is essentially this: petitioner argues that she requires two caretakers on-site 74.5 hours per week because it never is known when petitioner will have a seizure or other emergency, and when she does have such a situation, she will require two caretakers to handle the situation. The agency counters

that the IRIS funding cannot be used merely for supervision for two caretakers, thus limiting SHC to 47.25 hours per week.

In determining the amount of PCW time to approve, the Department of Health Services utilizes a Personal Care Screening Tool, a computer program it believes will allow it to consistently determine the number of hours required by each recipient. The screening tool allots a specific amount of time in each area the recipient requires help, which the Department's reviewer can then adjust to account for variables missing from the screening tool's calculations. The Department also uses a Personal Care Activity Time Allocation Table to determine allotted times for PCW tasks, which the Department follows unless the request explains specifically why additional time is necessary.

As was discussed in emails after the hearing, the IRIS agency's [REDACTED] [REDACTED], who reviewed the case for the agency, did not actually fill out a personal care screening tool. Instead, she reviewed petitioner's daily schedule, and ascribed PCW/SHC time for each task based on the number of instances per day a task was done, times the amount of time allowed by the Department in its Personal Care Activity Time Allocation Table (a copy of which was emailed by the agency post-hearing and is included as number 12:2 in petitioner's Supplemental Exhibit List).

The key to this decision is that the Department has agreed to allow SHC time for 2:1 assistance for petitioner's daily cares. Petitioner requests an additional 26.25 hours per week to, essentially, cover the remaining time per day when petitioner is awake. After reviewing the evidence and petitioner's post-hearing brief, I conclude that the agency action was appropriate. It is a longstanding Department policy that paid caregiver time is not allowed for mere supervision. The definition of PCW services found at Wis. Admin. Code §DHS 107.112(1)(a) covers only hands-on cares and chores; it does not include supervision, observation, or stand-by in case of emergency. In the IRIS program, SHC time can be given for supervision if the client needs "observation or indirect assistance" to maximize her independence. See IRIS Definition Manual, "Supportive Home Care." Here, however, there already is a full-time nurse on hand who is there in case petitioner has an emergency or unforeseen circumstance. Thus, there is not a specific medical or safety need to have a supportive home caretaker to supervise petitioner when she is not receiving active cares.

Petitioner's focus is on the need, in case of an emergency or unforeseen circumstance, to have two caretakers available to deal with it. That, however, is basically the same argument made in all cases where a recipient might be subject to unforeseen circumstances, and the Department has determined such circumstances not to be a basis for paid coverage.

Petitioner argues that the agency has the burden of proof. I disagree. Petitioner is the one asking for a new or increased service. It is the burden of the requester to show the need for the new service. Nevertheless, this decision does not resolve on the burden of proof. It resolves on the legal and policy basis that IRIS funds are not paid for what is, essentially, a second provider of supervision.

Petitioner argues that she has presented a prima facie case that 2:1 staffing is necessary. However, beyond the actual hands-on cares that the agency has agreed need 2:1 staffing, the rest of the time, it is argued, is necessary because of the "constant risk of harm" to petitioner as well as her caregiver. Again, funds are not allowed for supervision based upon a possible risk. If that were the case, virtually every disabled person would require a constant caretaker.

Petitioner put much focus on one incident in July, 2021, where petitioner fell and the nurse was injured while she and petitioner's brother helped petitioner. Unfortunately, an occasional incident is not a basis for introducing a full-time staff member to be there "in case" another incident occurs.

Petitioner complains that [REDACTED] [REDACTED] used the Personal Care Allocation Tool to determine SHC hours. The use of the tool makes perfect sense given that the additional SHC hours are meant to replace PCW hours due to the inability to find a PCW agency.

Finally, petitioner criticizes some of the individual care determinations. She argues that only one instance of dressing is allowed. I understand petitioner's confusion there, but one instance of dressing per day is always included with the bathing task. In all cases in which bathing takes place daily, only one PCW dressing task is allowed. See MA Prior Authorization Guidelines, Topic 11497, under "Bathing," found on-line at the ForwardHealth portal. She complains that there is only one instance of mobility per day. However, testimony is that petitioner ambulates for exercise once per day, requiring two staff, for 3-5 minutes. Otherwise, petitioner is pushed in her wheelchair. See page C-9 of the agency's submission, the Long-Term Functional Screen, under "Mobility." Certainly, pushing the wheelchair does not require two staff. That petitioner might get out of her chair on her own is, again, unpredictable and is another instance of supervision rather than direct care.

Finally, petitioner argues that the time allotments on the Tool do not account for petitioner's behaviors and seizures. However, petitioner has not provided any detail on how time is affected by those factors, only making the general statement that those factors make care more difficult and time consuming.

I affirm the agency's determination. Petitioner has 2:1 support 47.25 hours per week, when the other approved 30 hours of SHC are added to the 17.25 PCW/SHC hours. If petitioner's caregivers can provide documentary evidence that actual hands-on 2:1 PCW cares take more than 17.25 hours per week, they can present the documentation to the agency for consideration.

CONCLUSIONS OF LAW

The IRIS agency correctly approved 47.25 weekly hours SHC, of which 17.25 are for 2:1 assistance with activities of daily living; additional time for supervision due to possible risk issues is not covered.

THEREFORE, it is

ORDERED

That the petition for review is hereby dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 4822 Madison Yards Way, 5th Floor North, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

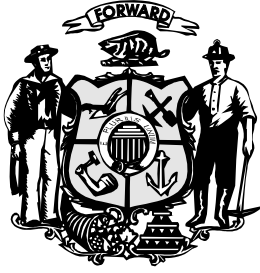
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 23rd day of February, 2022

A handwritten signature in blue ink, appearing to read 'Brian C. Schneider', is written over a horizontal line.

Brian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
5th Floor North
4822 Madison Yards Way
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on February 23, 2022.

Bureau of Long-Term Support
Attorney [REDACTED]